

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

BEST BUY STORES, L.P.,

Plaintiff,

v.

ULTIMATE ACQUISITION
PARTNERS, L.P., d/b/a Ultimate
Electronics,

Defendant.

Civil No.: 10-1630 JNE/JSM

COMPLAINT

Demand for Jury Trial

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CLERK
U.S. DISTRICT COURT
MINNEAPOLIS, MINNESOTA

COMPLAINT

Best Buy Stores, L.P. ("Best Buy") brings this action to enjoin and recover damages arising from a systematic campaign of false and misleading advertising being disseminated by its competitor Ultimate Acquisition Partners, L.P. d/b/a Ultimate Electronics ("Ultimate"), and alleges as follows:

NATURE OF THE ACTION

1. This action arises under the Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), the Minnesota Deceptive Trade Practices Act, Minn. Stat. 325D.44, Consumer Fraud Protection Act, Minn. Stat. 325F.69, and Minnesota's false advertising statute, Minnesota Statutes Section 325F.67, and concerns an ongoing advertising campaign that makes false comparisons between Ultimate's and Best Buy's pricing on consumer electronic products. In particular, for at least the last two years, Ultimate has conducted an extensive marketing campaign in radio, Internet, outdoor, print, and point-of-sale

advertising, conveying the false and misleading message that consumers who shop at Ultimate will always get the lowest price and that Ultimate's prices always beat Best Buy's—in which Ultimate makes the following express claims:

- *“Every day we shop . . . Best Buy then adjust our prices to beat theirs, so you know we have the lowest electronic prices period”*
- *“We adjust our prices daily. Contact your nearest store for the lowest prices period.”*
- *“We shop the competition so you don't have to.”*

Ultimate's claims are literally false because Ultimate's prices are frequently *higher* than Best Buy's prices for the same items. Ultimate's claims are also false and misleading because they convey the message to consumers that they do not need to comparison shop because Ultimate does the comparison shopping itself and can assure consumers its prices are lower than Best Buy's. In fact, however, because Ultimate's prices are often *higher* than Best Buy's, consumers do need to comparison shop to obtain the lowest prices.

2. Ultimate's advertising campaign is particularly harmful because it strikes at the heart of competition in the consumer electronics business and misleads consumers into surrendering the most effective tool they have to ensure competitive pricing: the ability to comparison shop and determine which retailer actually does offer the lowest price.

3. Ultimate's false advertising campaign has already caused and is causing irreparable harm to Best Buy through pecuniary loss, damage to reputation, and loss of goodwill. To prevent further irreparable harm, Best Buy seeks, and is entitled to, an injunction prohibiting Ultimate from disseminating false and misleading claims. Best

Buy also seeks, and is entitled to, an award of damages caused by Defendants' unlawful conduct and other relief authorized by law.

PARTIES

4. Best Buy is a Virginia limited partnership, with its principal place of business headquartered at 7601 Penn Avenue South, Richfield, Minnesota 55423.

5. Ultimate is a Limited Partnership with its principal place of business headquartered at 321 West 84th Avenue, Suite A, Thornton, CO 80260. Ultimate is a subsidiary of Wattles Capital Management, LLC, which upon information and belief is owned by Mark Wattles, a citizen of Nevada. Ultimate conducts business and has committed wrongful acts in this District and therefore, is subject to the jurisdiction of this Court.

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. § 1121(a) and 28 U.S.C. §§ 1331 and 1367(a).

7. The matter in controversy in this action exceeds the sum or value of \$75,000 and is between citizens of different states. Therefore, the Court also has jurisdiction pursuant to 28 U.S.C. § 1332.

8. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Ultimate has stores and offices in this district, is doing business in this district, and is advertising in this district the false and misleading statements at issue.

FACTS

9. Best Buy is a leading retailer of consumer electronics, home office products, entertainment software, appliances, and related services, and operates retail stores throughout the United States.

10. Ultimate operates a chain of retail electronics stores in eleven states—including six stores in Minnesota—and sells consumer electronics products directly through its website, www.ultimateelectronics.com.

11. Ultimate directly competes with Best Buy in the sale of consumer electronic products to consumers.

12. For at least the past two years, Ultimate has engaged in an advertising campaign, through radio, Internet, outdoor, print, and point-of-sale advertising, in which it has directly compared its prices to those of Best Buy and conveyed the false and misleading message to consumers that if they shop at Ultimate, they will always get the lowest price and that Ultimate's prices will always "beat" Best Buy's because Ultimate verifies daily that its prices are lower than Best Buy's prices for the same items.

13. In its advertisements, Ultimate has claimed that "*Every day we shop Walmart and Best Buy then adjust our prices to beat theirs, so you know we have the lowest electronic prices period*" and "*We adjust our prices daily. Contact your nearest store for the lowest prices period*" and "*We shop the competition so you don't have to.*"

14. The following are just a few examples of Ultimate's advertising materials, which highlight these false and misleading claims:

a. Banner Advertisement on www.ultimateelectronics.com (last visited Apr. 9, 2010).



Figure 1. See Exhibit A.

b. Print Advertisements

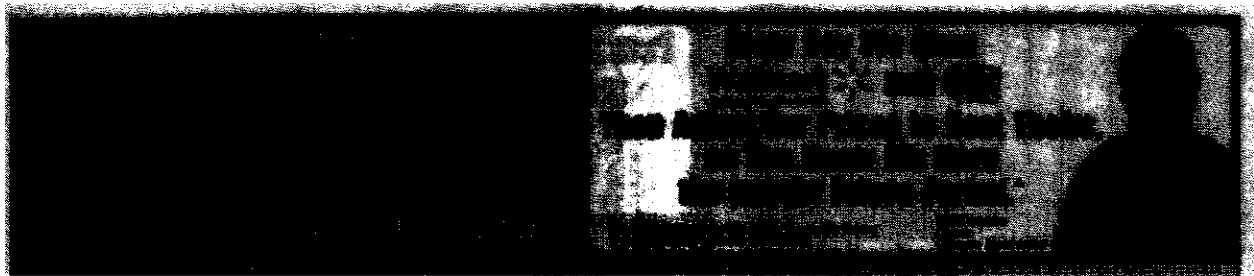


Figure 2. See Exhibit B.

c. Outdoor Advertising



Figure 3. See Exhibit C

15. Upon information and belief, Ultimate intentionally caused the advertising statements at issue to influence the purchasing decisions of consumers and with an intent to harm the pecuniary interests of Best Buy. These statements convey the message to consumers that they do not have to comparison shop at Best Buy because Ultimate has done it for them, so that consumers will purchase consumer electronic products from

Ultimate with the assurance that its pricing is lower than what Best Buy offers for the same products.

16. In reality, Ultimate does not offer the “lowest prices period.” Ultimate’s prices for consumer electronics products are frequently *higher* than Best Buy’s prices for the same products. Further, upon information and belief, Ultimate does not shop each of the Best Buy stores “every day” and adjust its prices on each of its products to “beat” Best Buy’s prices.

17. For example, in late 2009, Best Buy conducted a series of pricing surveys in markets throughout the United States, which confirmed that Ultimate’s prices were frequently *higher* than Best Buy’s. For some product categories, Ultimate’s prices were *higher* than Best Buy’s in a majority of instances.

18. In another example, upon information and belief, Ultimate’s advertising claims failed a test conducted by the Better Business Bureau for Minnesota and North Dakota in early 2008. *See* H.J. Cummins, *BBB contests Ultimate’s lowest-price advertising*, Minneapolis Star Tribune, Feb. 12, 2008, at 1D. According to public reporting of the test comparing Ultimate’s and Best Buy’s prices, Ultimate had the lowest price on only three of the seven television models that were tested. The report stated that the Denver-area Better Business Bureau similarly challenged Ultimate’s “lowest price” claim, and dropped Ultimate’s rating from satisfactory to unsatisfactory.

19. Best Buy, too, has notified Ultimate that its advertising claims are false and misleading and requested that they cease.

20. On January 5, 2010, Best Buy filed a complaint with the National Advertising Division of the Council of Better Business Bureaus (“NAD”), the primary self-regulatory body of the advertising industry that arbitrates advertising disputes, alleging that Ultimate’s advertising was false and misleading. The NAD opened an inquiry of Ultimate’s advertising based on Best Buy’s complaint. Ultimate, however, did not respond to the NAD’s inquiry. On April 12, 2010, pursuant to NAD procedures, the NAD issued a press release stating it has referred the matter the U.S. Federal Trade Commission for further enforcement due to Ultimate’s failure to respond to its inquiry.

21. Despite Best Buy’s request and the NAD complaint, not to mention the reported findings of the Minnesota and North Dakota Better Business Bureau, Ultimate has refused to voluntarily discontinue its false and misleading campaign and continues to flood the airwaves, Internet, print, outdoor, and point-of-sale media with its false and misleading campaign to convince consumers that they need not comparison shop at Best Buy because they “know” that Ultimate will offer “the lowest prices period.”

22. Ultimate continues to disseminate its false and misleading advertisements willfully, despite its awareness, as its Chairman and CEO Mark Wattles acknowledged, “that claiming that we always beat your prices and in fact doing it is problematic at best.” Email from Mark Wattles to Brian Dunn (March 15, 2010).

FIRST CAUSE OF ACTION

Lanham Act False Advertising, 15 U.S.C. § 1125(a)

23. Best Buy repeats the allegations in paragraphs 1 through 22 as if fully set forth herein.

24. Ultimate's false and misleading statements regarding the comparison between their prices and those of Best Buy and other retailers constitutes false advertising in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

25. Ultimate's claim in its advertisements that "*Every day we shop Walmart and Best Buy then adjust our prices to beat theirs, so you know we have the lowest electronic prices period*" is literally false and misleading,

26. Ultimate's claim in its advertisements that "*We adjust our prices daily. Contact your nearest store for the lowest prices period*" is literally false and misleading.

27. Ultimate's claim in its advertisements that "*We shop the competition so you don't have to*" is literally false and misleading, because it conveys the message to consumers that they do not have to do their own comparison shopping because Ultimate's prices will always be lower than Best Buy's.

28. Ultimate's false and misleading advertisements, individually and in combination, are material and likely to influence customers purchasing decisions.

29. Ultimate sells consumer electronics in interstate commerce at retail locations around the United States, including six stores in Minnesota, and through the Internet.

30. Ultimate's false and misleading advertisements have damaged, and will continue to damage, the pecuniary interests of Best Buy.

31. Upon information and belief, Ultimate is waging its false and misleading advertising campaign willfully and with full knowledge of its false and misleading nature, and of its tendency to deceive.

32. If Ultimate is allowed to continue its false and misleading advertisements, Best Buy will suffer irreparable harm for which it has no adequate remedy at law.

33. As a result of Ultimate's wrongful conduct, Best Buy is entitled to injunctive relief, recovery of Ultimate's profits obtained as a result of its false advertising, damages in an amount to be determined at trial, recovery of all attorneys' fees and costs incurred, and corrective advertising to be determined by the Court.

SECOND CAUSE OF ACTION

Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44

34. Best Buy repeats the allegations in paragraphs 1 through 33 as if fully set forth herein.

35. Ultimate's conduct, described above, constitutes willful and knowing deceptive trade practices, in violation of the Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44.

36. Ultimate has made express and implied misrepresentations of fact regarding their products.

37. Ultimate has made express and implied misrepresentations of fact that expressly name Best Buy's products.

38. Ultimate's false and misleading advertisements otherwise creates a likelihood of confusion or misunderstanding among consumers regarding Ultimate's and Best Buys' products.

39. Not only are Ultimate's deceptive practices injurious to the public, but its actions also damage Best Buy's reputation for quality products and low prices among

consumers and diverts sales from Best Buy, thereby damaging Best Buy's pecuniary interests.

40. Best Buy and the consuming public have been irreparably harmed, and will be irreparably harmed if such deceptive trade practices are allowed to continue.

41. As a result of Ultimate's wrongful conduct, Best Buy is entitled to injunctive relief, and recovery of all attorneys' fees and costs incurred.

THIRD CAUSE OF ACTION

Minnesota False Statement in Advertisement Act, Minn. Stat. § 325F.67

42. Best Buy repeats the allegations in paragraphs 1 through 41 as if fully set forth herein.

43. Ultimate's conduct, described above, constitutes a willful and knowing violation of the Minnesota False Statement in Advertisement Act, specifically Minn. Stat. § 325F.67, which prohibits the dissemination of false, deceptive, and misleading advertisements. Under Minn. Stat. § 8.31 subd. 3a, "any person injured" by a violation of these statutes may bring an action for damages, equitable relief, costs, and attorney's fees.

44. Best Buy and the consuming public have been irreparably harmed by Defendants' false advertisements, false and misleading statements, and deceptive practices in connection with the sale of its products, and will be irreparably harmed if such deceptive trade practices are allowed to continue.

45. As a result of Ultimate's wrongful conduct, Best Buy is entitled to injunctive relief, recovery of Ultimate's profits obtained as a result of its wrongful

conduct, damages in an amount to be determined at trial, and recovery of all attorneys' fees and costs incurred.

FOURTH CAUSE OF ACTION

Minnesota Consumer Fraud Protection Act, Minn. Stat. § 325F.69

46. Best Buy repeats the allegations in paragraphs 1 through 45 as if fully set forth herein.

47. Ultimate's conduct, described above, constitutes a willful and knowing violation of the Minnesota Consumer Fraud Protection Act, specifically Minn. Stat. § 325F.69, which prohibits the use of any "fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise. Under Minn. Stat. § 8.31 subd. 3a, "any person injured" by a violation of these statutes may bring an action for damages, equitable relief, costs, and attorney's fees.

48. Best Buy and the consuming public have been irreparably harmed by Defendants' false advertisements, false and misleading statements, and deceptive practices in connection with the sale of its products, and will be irreparably harmed if such deceptive trade practices are allowed to continue.

49. As a result of Ultimate's wrongful conduct, Best Buy is entitled to injunctive relief, recovery of Ultimate's profits obtained as a result of its wrongful conduct, damages in an amount to be determined at trial, and recovery of all attorneys' fees and costs incurred.

PRAYER FOR RELIEF

WHEREFORE, Best Buy respectfully requests the following remedies and relief:

1. An order that judgment be entered for Plaintiff Best Buy and against Defendant Ultimate on all claims alleged herein.
2. A permanent injunction restraining Ultimate from broadcasting, or entering into any agreement for the printing or broadcasting of, or otherwise carrying on, the false advertising statements identified in this complaint, or any advertising which communicates similar false messages;
3. An order requiring Ultimate to deliver up and destroy all advertisements and other promotional materials bearing or using the false and misleading advertising claims identified in this complaint;
4. An order requiring Ultimate to immediately make corrective advertisements in all media in which it placed the original statements, including without limitation, the newspapers, radio stations, Internet, outdoor, and point-of-sale locations in which its false advertisements appeared. Such statements shall run for an equal number of days as the false and misleading advertisements appeared and the same number of publications and number of consecutive issues of the publications and in the same manner and frequency of dissemination as the offending statements appeared;
5. An order requiring Ultimate to file with this Court and to serve upon Best Buy's counsel within 30 days after entry and service of an injunction, a report in writing and under oath setting forth in detail the manner and form in which it has complied with the injunction;

6. A monetary award to compensate Best Buy for all injury resulting from Ultimate's false advertising and deceptive practices, including lost profits, lost sales, and expenditures for past or future corrective advertising, to be trebled in accordance with 15 U.S.C. § 1117;

7. A monetary award of all of Ultimate's profits derived from its false and misleading advertising, to be trebled in accordance with 15 U.S.C. § 1117;

8. An award of Best Buy's costs and disbursements in bringing this action, including its reasonable attorneys' fees;

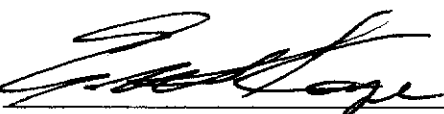
9. And such other relief as the Court may deem appropriate.

DEMAND FOR JURY TRIAL

Plaintiff respectfully demands a trial by jury on all issues triable by right to a jury.

Dated: April 16, 2010

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: 
Elliott S. Kaplan (MN #53624)
Stephen P. Safranski (MN #331326)
Laura E. Nelson (MN #342798)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
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ATTORNEYS FOR BEST BUY STORES, L.P.

Exhibit A

Unbeatable Prices Every Day

The **Lowest Prices** Period

ULTIMATE

ELECTRONICS APPLIANCES
GAMES COMPUTERS MOVIES

Every Day We Shop **Walmart*** and **Best Buy**

Save money. Live better.

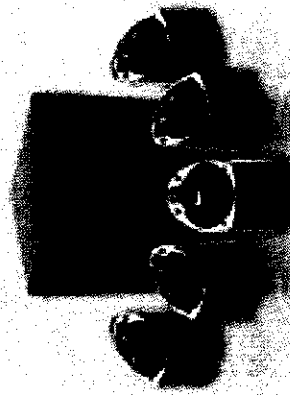
Then Adjust Our Prices to Beat Theirs, so You Know We Have the Lowest Prices Period.

Ultimate Electronics is not affiliated with or sponsored by Walmart or Best Buy. Excludes online only special pricing.



Get Everything You Need

FOR YOUR RIDE



Create the Perfect

HOME THEATER

Cash for Appliances



GOVERNMENT REBATE PROGRAM

*Appliances available at select locations



Your Source for the Best Prices on **BLU-RAY PLAYERS**

Exhibit B

At the top of the page, there is a header area with some text that is mostly illegible due to the high contrast and noise. Below this, there are several paragraphs of text, some of which are obscured by dark, irregular shapes. At the bottom, there is a large, bold, sans-serif text block that reads "PAY NO INTEREST FOR 12 MONTHS". Above this, there are smaller, less legible text blocks and what appears to be a logo or brand name.

Let Our Experts Deliver & Install It For You

18 Months
FREE WARRANTY FOR
\$17,999

\$14,999
\$3,999

474
990
1999

1408

HOLIDAY SALE

Lowest Price

59

ipod

JVC

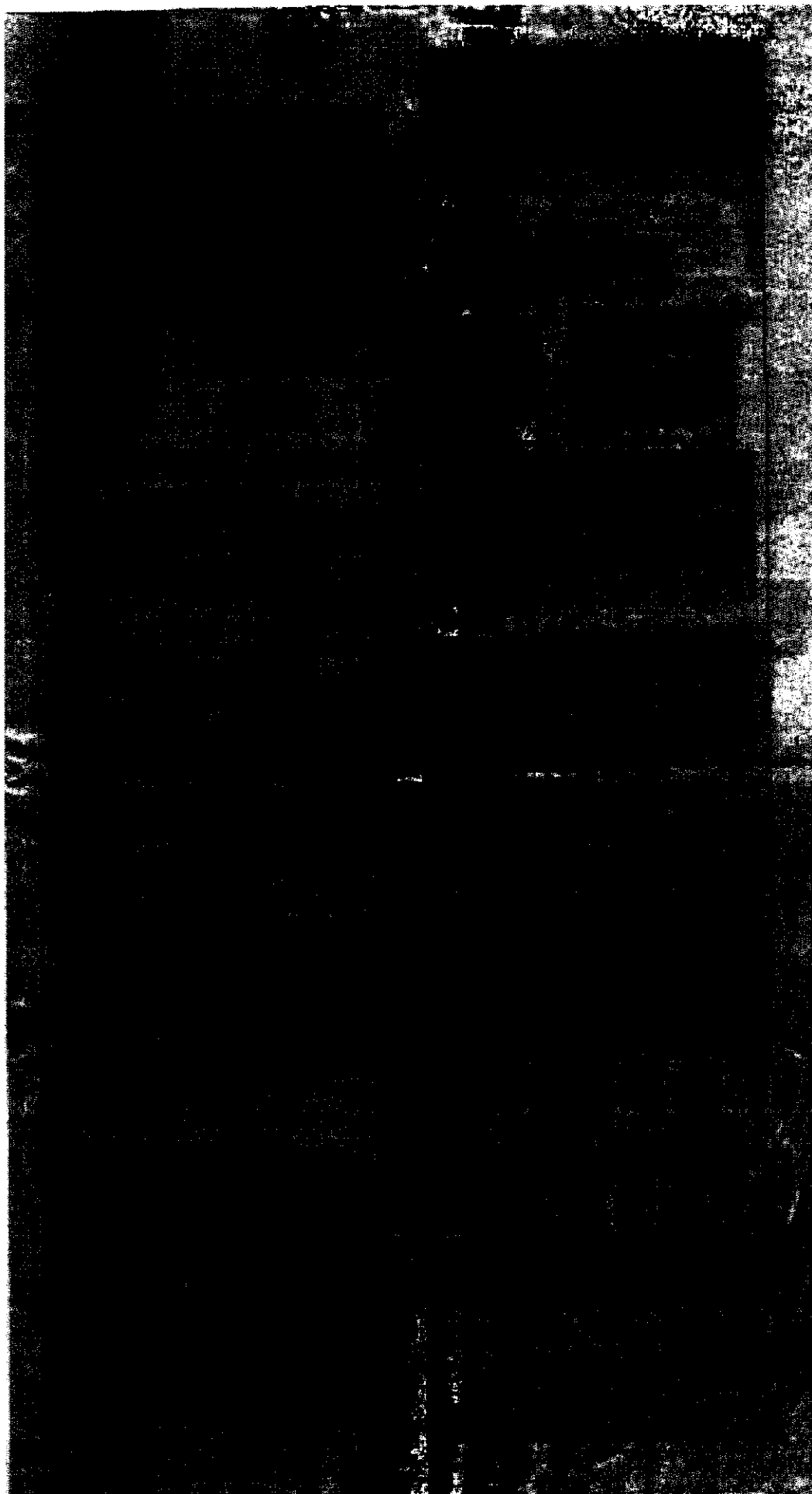
SONY

HOLIDAY SALE

Call Your Family Around & Buy Low!

Don't Miss the Best Deal! * and *
 Don't Miss the Best Deal! * and *
 Don't Miss the Best Deal! * and *

199	589	749	879
789	899	999	1099
1199	1299	1399	1499
1599	1699	1799	1899
1999	2099	2199	2299
2399	2499	2599	2699
2799	2899	2999	3099
3199	3299	3399	3499
3599	3699	3799	3899
3999	4099	4199	4299
4399	4499	4599	4699
4799	4899	4999	5099
5199	5299	5399	5499
5599	5699	5799	5899
5999	6099	6199	6299
6399	6499	6599	6699
6799	6899	6999	7099
7199	7299	7399	7499
7599	7699	7799	7899
7999	8099	8199	8299
8399	8499	8599	8699
8799	8899	8999	9099
9199	9299	9399	9499
9599	9699	9799	9899
9999	10099	10199	10299
10399	10499	10599	10699
10799	10899	10999	11099
11199	11299	11399	11499
11599	11699	11799	11899
11999	12099	12199	12299
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12799	12899	12999	13099
13199	13299	13399	13499
13599	13699	13799	13899
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22399	22499	22599	22699
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29199	29299	29399	29499
29599	29699	29799	29899
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30399	30499	30599	30699
30799	30899	30999	31099
31199	31299	31399	31499
31599	31699	31799	31899
31999	32099	32199	32299
32399	32499	32599	32699
32799	32899	32999	33099
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46799	46899	46999	47099
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47599	47699	47799	47899
47999	48099	48199	48299
48399	48499	48599	48699
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51199	51299	51399	51499
51599	51699	51799	51899
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55199	55299	55399	55499
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55999	56099	56199	56299
56399	56499	56599	56699
56799	56899	56999	57099
57199	57299	57399	57499
57599	57699	57799	57899
57999	58099	58199	58299
58399	58499	58599	58699
58799	58899	58999	59099
59199	59299	59399	59499
59599	59699	59799	59899
59999	60099	60199	60299
60399	60499	60599	60699
60799	60899	60999	61099
61199	61299	61399	61499
61599	61699	61799	61899
61999	62099	62199	62299
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62799	62899	62999	63099
63199	63299	63399	63499
63599	63699	63799	63899
63999	64099	64199	64299
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68799	68899	68999	69099
69199	69299	69399	69499
69599	69699	69799	69899
69999	70099	70199	70299
70399	70499	70599	70699
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71599	71699	71799	71899
71999	72099	72199	72299
72399	72499	72599	72699
72799	72899	72999	73099
73199	73299	73399	73499
73599	73699	73799	73899
73999	74099	74199	74299
74399	74499	74599	74699
74799	74899	74999	75099
75199	75299	75399	75499
75599	75699	75799	75899
75999	76099	76199	76299
76399	76499	76599	76699
76799	76899	76999	77099
77199	77299	77399	77499
77599	77699	77799	77899
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78799	78899	78999	79099
79199	79299	79399	79499
79599	79699	79799	79899
79999	80099	80199	80299
80399	80499	80599	80699
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81599	81699	81799	81899
81999	82099	82199	82299
82399	82499	82599	82699
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83599	83699	83799	83899
83999	84099	84199	84299
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88799	88899	88999	89099
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94799	94899	94999	95099
95199	95299	95399	95499
95599	95699	95799	95899
95999	96099	96199	96299
96399	96499	96599	96699
96799			



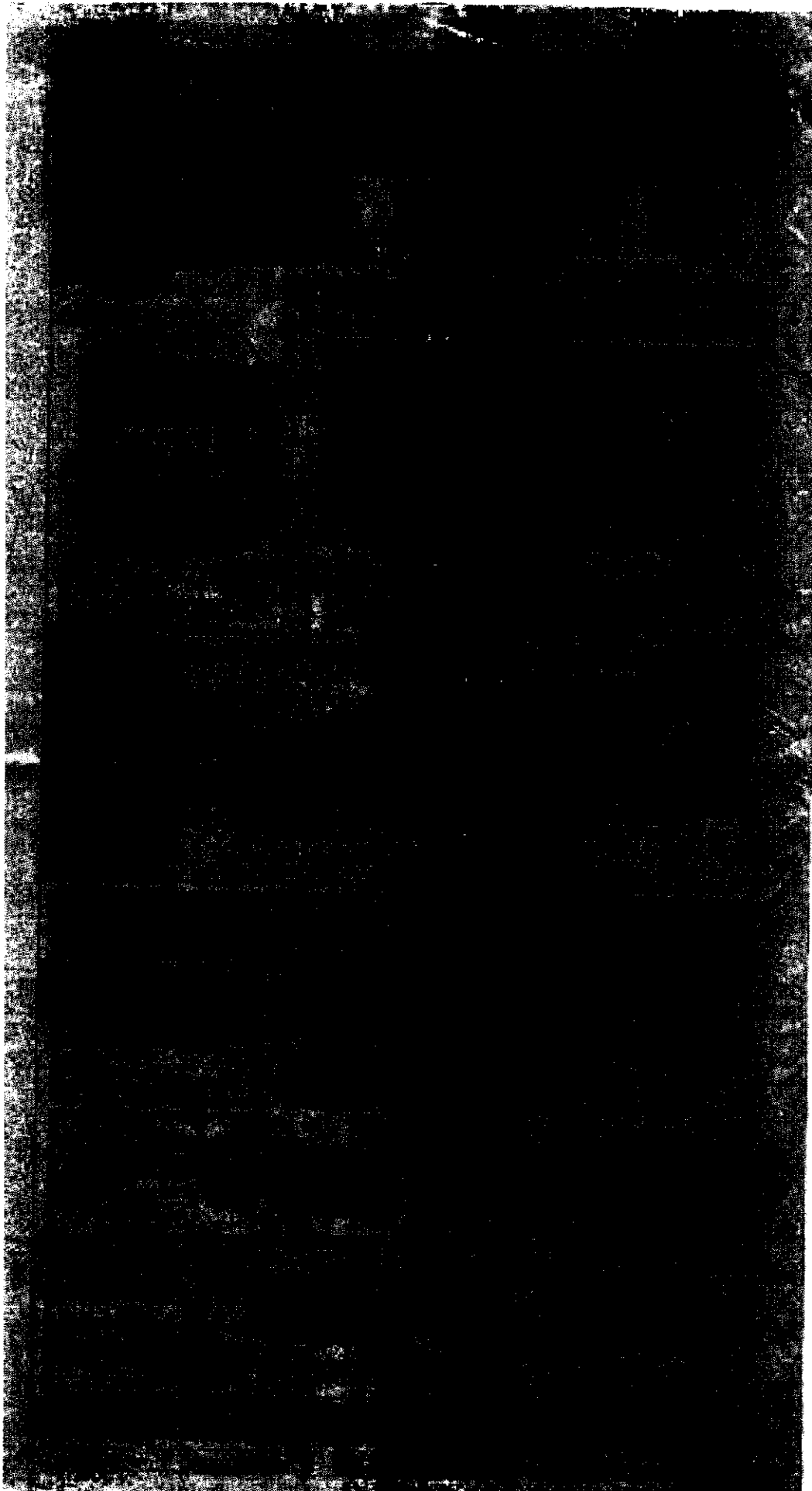


Exhibit C



Walmart

for you and